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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT, in his official capacity as Attorney General,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The American Intellectual Property Law Association ("AIPLA") is a national association of more than 14,000 members whose interests lie in copyright, patent, trademark, trade secret, and other areas of intellectual property law. The AIPLA's members include attorneys in private practice and attorneys employed by corporations, universities, and government, and represent both owners and users of intellectual property. Unlike many other areas of practice in which separate and distinct plaintiffs' and defendants' bars exist, most, if not all, intellectual property attorneys represent both intellectual property owners and alleged infringers.

The AIPLA has no stake in the parties to this litigation or the result of this case, other than its interest in seeking the correct interpretation of the law affecting intellectual property.

CONSENT TO FILING OF *AMICUS CURIAE* BRIEF

In accordance with Supreme Court Rule 37.3(a), the AIPLA has obtained written consent to the filing of this brief from the counsel of record for both parties. The consent of the Petitioners has already been filed with the Court and the consent of the Respondent is being lodged herewith.

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1. In accordance with Supreme Court Rule 37.6, *amicus curiae* states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae* or its counsel.

SUMMARY OF ARGUMENT

Article I, section 8 of the Constitution grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Sonny Bono Copyright Term Extension Act ("CTEA"), which extended the term of protection for all copyrights subsisting at the time of its passage, is a proper exercise of this Article I power, and is consistent with the First Amendment.

A reversal of the decisions below would create grave consequences for other areas of intellectual property law not directly placed at issue here. Since 1790, many changes to the Copyright Act have enhanced the rights of all holders of extant copyrights, and significant investments have been made based on these enactments. Similarly, the patent laws also have been amended to extend the term, even retrospectively, of protection for existing patented inventions. The likely repercussions of a reversal in this case would be destabilizing and injurious to intellectual property owners and to the nation's economy.

ARGUMENT

I. Reversal Of Congressional Power To Extend Existing Copyright Terms Would Destabilize Other Areas Of The Law

Innumerable transactions have occurred in reliance on provisions of the copyright and patent acts in which longer terms or additional property rights were granted in existing works. Owners of copyright have granted licenses in works

that would otherwise have entered the public domain, or would not enjoy the specific rights the owners have licensed. Those licenses often included significant warranties regarding the validity of the copyrights involved. Licensees have invested enormous sums in projects based on those licenses in reliance on the copyrights. In many cases, those licensees raised money from investors based on the scope and validity of their copyrights as provided for by these acts of Congress. The current stock price of many public companies involved in the film, television, music and other industries that create or disseminate works of authorship is based on anticipated profits from works that are currently protected, but whose protection may be nullified if this Court strikes down the CTEA. Further, this problem would not only apply to transactions occurring since 1998, because, in striking down the allegedly retroactive aspect of the CTEA, this Court would call into question the term extension under the 1976 Act and many prior extensions. This could undermine the fundamental consideration underlying tens of thousands or more transactions involving untold billions of dollars. *Cf. Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. ___, 122 S. Ct. 1831, 1841 (2002) ("*Warner-Jenkinson*, . . . instructed that courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community").

In addition to extensions to the terms of copyright protection for existing works, discussed at II.A.2., *infra*, various additional property rights have been extended to copyright owners after the copyright had already been granted. The expectations of owners currently exploiting these rights would also be unsettled by a reversal here.

One example of this is the Digital Performance Rights in Sound Recordings Act of 1995 ("DPRA").[2] This Act bestows upon sound recording copyright owners the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[3] This right was given to any copyright owner, including owners of sound recording copyrights that were granted before the effective date of the DPRA.[4] Without this right the value of many existing works could be destroyed in a moment on the Internet. Additional rights were similarly granted to holders of copyrights for architectural works,[5] increases in the compulsory license fees for existing works,[6] limits on the first sale doctrine for computer software and sound recordings,[7] and as part of Congress' restoration of copyright protection to foreign works as part of the Uruguay Round Agreements Act, in connection with the GATT trade agreement, *see infra*.[8] Thus, in addition to implicating extensions of existing terms, Petitioners' rationale for holding the CTEA unconstitutional would similarly apply to all of the foregoing grants of additional rights in existing works.

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2. Pub. L. No. 104-39, 109 Stat. 336 (1995).

3. 17 U.S.C. § 106 (1995).

4. *Id.*

5. 17 U.S.C. § 120 (1990).

6. 17 U.S.C. §§ 111(d), 115 (1976).

7. 17 U.S.C. § 109(b) (1976).

8. 17 U.S.C. § 104A (1994).

Moreover, the effects of a broad holding prohibiting extensions of existing terms might not be limited to copyright law. Under the Uruguay Round Agreements Act ("URAA"),[9] the term of existing patents was extended from seventeen years from date of issuance to the longer of twenty years from filing or seventeen years from issuance.[10] While the URAA did not extend the duration of every patent, a 1994 study reported that approximately 75 percent of existing patents would be extended an average of 253 days.[11] Many of the patents affected by the URAA's extension are still benefiting from the additional term of protection.[12] Moreover, the URAA was passed as part of the United States' obligations under the GATT international trade agreement. If the URAA patent term extension were held unconstitutional on the same basis as the CTEA is herein being attacked, the United States could be held in default of its obligations under the GATT treaty. The U.S. challenged Canada on this very point in the World Trade Organization, and received a favorable panel decision; *Canada — Term of Patent Protection: Report of the Panel* (WT/DS170/R, May 5, 2000) and a favorable appellate ruling *Canada — Term of Patent Protection: Report of the Appellate Body*, AB-2000-7 (WT/DS170/AB/R, September 18, 2000).

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9. Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994) (codified in scattered sections of the United States Code).

10. 35 U.S.C. § 154(a)(2).

11. Mark A. Lemley, *An Empirical Study of the Twenty-Year Patent Term*, 22 AIPLA Q.J. 369, 391-92 (1994).

12. *See generally* Lemley, *supra* note 11.

Other extensions of existing terms have been granted to drug patents[13] and to patents owned by World War I[14] and World War II veterans.[15] These term extensions would be similarly implicated by a broad holding that any grant of additional rights in existing works is impermissible under the Copyright Clause.

II. Congress Has Authority Under The Copyright Clause To Extend Existing Copyrights

A. Extending the Terms of Existing Copyrights Does Not Violate the "Limited Times" Provision

Petitioners' "limited Times" argument is premised on an unduly narrow interpretation of the Copyright Clause, and is inconsistent with Congress' historical practice of granting copyright extensions for existing works.

1. The CTEA Is Consistent with the Copyright Clause

By restricting copyright terms to "limited Times," the Copyright Clause simply prohibits Congress from granting authors a copyright for an indefinite or unlimited time period. The CTEA does not grant authors open-ended or unlimited copyrights. Rather, it establishes copyright terms of precise

13. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, Title II, 98 Stat. 1585, 1598 (1984) (codified as amended in 35 U.S.C. § 156)

14. Act of May 31, 1928, ch. 992, § 1, 45 Stat. 1012 (1928).

15. Pub. L. No. 81-958, ch. 444, 64 Stat. 316 (1950).

and definite length. *See* 17 U.S.C. § 302 (providing a term of 95 years from publication or 120 years from creation, whichever is shorter, for works for hire and pseudonymous works and a term of the life of the author plus 70 years for other works). The limited copyright terms of the CTEA thus fall within Congress' authority to grant copyrights for "limited Times."

Petitioners note that the Framers first rejected language that would have restricted copyright protection to "a certain time" in favor of for "for limited Times." Pet'r Br. at 17. The Random House Dictionary defines "certain" as "fixed; agreed upon; settled upon," whereas it defines limited as "confined within limits; circumscribed." The Random House Dictionary of the English Language 339, 1115 (2d ed. 1987). When the Framers replaced "certain" with "limited," they replaced a term describing a period that is fixed and settled with a term describing a period that is not necessarily unchanging. Indeed, by making "Times" plural ("limited Times" as opposed to "a certain time"), the Framers used language that broadly permits Congress to set more than one term for a copyright.

2. History Confirms the Constitutionality of Extensions of Copyright Terms for Existing Works

From the First Congress until today, Congress has consistently exercised the power to extend existing copyright terms for "limited Times."[16] Before 1790, twelve of the

16. Since the first federal copyright act in 1790, subsequent Congresses have passed additional extensions which have applied both retrospectively and prospectively. In 1831 Congress extended (Cont'd)

thirteen original states had enacted individual copyright statutes which varied in scope and duration. *See* Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 Bull. Copyright Soc'y 11 (1975); *see also* Bruce W. Bugbee, *The Genesis of American Patent and Copyright Law* 104-24 (1967). To establish national uniformity and enforceability, the First Congress passed the Copyright Act of 1790. *See* Crawford, *supra*, at 36. This Act unequivocally applied to works "already printed within these United States." Act of May 31, 1790, ch. 15, 1 Stat. 124, § 1.

There is no basis in the Copyright Clause for distinguishing between the creation of new federal rights and extending existing ones. Indeed, the 1790 Act demonstrates why the limited times requirement does not preclude the extension of existing copyright terms.

(Cont'd)

the copyright term from 14 years to 28 years, with a 14 year renewal term. Act of Feb. 3, 1831, ch. 16, §§ 1-2, 4 Stat. 436. That act explicitly stated that preexisting copyrights that had not already expired would receive "the benefit of each and all the provisions of this act. . . ." *Id.* § 16. In 1909, Congress increased the renewal term from 14 to 28 years for all copyrights "subsisting in any work at the time when the Act goes into effect." *See* Act of March 4, 1909, ch. 320, § 24, 35 Stat. 1075, 1080. Then, in 1976, Congress extended the copyright term for works of natural persons to "the life of the author and fifty years after the author's death" for works created on or after January 1, 1978, 17 U.S.C. § 302, and extended subsisting copyrights by as much as 19 years — from a maximum term of 56 years to a maximum term of 75 years, *id.* § 304(a), (b). Copyrights in new works for hire and pseudonymous works were similarly extended from a maximum term of 56 years from publication to a term of 75 years from publication or 100 years from creation, whichever is shorter. Congress has also enacted a substantial number of less significant extensions, as stated in Petitioners' brief. Pet'r Br. at 2 n.1. None of the grounds for distinguishing these subsequent extensions (*see* Pet'r Br. at 30 n.13) addresses the limited times, quid pro quo, or originality challenges that Petitioners bring against the CTEA.

First, had Congress understood the "limited Times" requirement to bar any extension of copyright terms for existing works, it would have tailored the first Copyright Act to apply only prospectively. For example, Congress could have allowed state laws to continue to protect existing works for some transition period. Second, Petitioners do not reconcile the retrospective effect of the 1790 Act with their other originality and "quid pro quo" theories. According to Petitioners, once a work is "already in existence" it is no longer original for purposes of copyright protection. Pet'r Br. at 33. Similarly, Petitioners read into the Clause a new, implied and narrow "quid pro quo" restriction, which bars giving an author any additional copyright-related remuneration beyond what the author was entitled to receive at the time the work was created. If Petitioners' theories of originality and quid pro quo were correct, no work already in existence in 1790 should have qualified for copyright protection under the 1790 Act.[17] Yet the Act explicitly applied to "works already printed within these United States."

Both the Copyright Clause and the historical practice of granting copyright extensions for existing works suggest that the CTEA is a proper exercise of Congressional power under Article 1, section 8.

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17. In addition, Petitioners' quid pro quo theory is inconsistent with other amendments to the copyright law, such as the 1984 amendment 17 U.S.C. § 109 in which Congress created a rental right exception to the first sale doctrine. It also conflicts with numerous laws Congress passed which diminish the exclusive rights of authors with respect to existing works. *See, e.g.*, 17 U.S.C. §§ 108, 110, 111, 112, 1008; Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of United States Code Titles 17, 28, and 35).

The pace of technological advancement relating to the creation and dissemination of copyrighted works, and the public adoption of that technology, exploded in the second half of the 20th Century. Advancement in that period outstripped all prior advances combined since Gutenberg invented the printing press. As the Senate Committee on the Judiciary Report states, these advances have greatly increased the commercial life of many works of authorship. *See* S. Rep. No. 104-315, at 12 (1996). Thus, the extensions over the last 40 years or so do not indicate an improper motive in Congress. Rather, they indicate that Congress has responded appropriately to enormously important changes in technology, and to changing international norms. *Cf. Sony Corp. v. Universal City Studios*, 464 U.S. 417, 430-31 (1984) ("Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary.")

B. The CTEA Meets Any Requirement That Congress Promote Progress When It Sets Copyright Terms

This Court has held that copyright "is intended to motivate the creative activity of authors and inventors," and is not "primarily designed to provide a special private benefit." *Sony*, 464 U.S. at 429. But the Court has never held copyright legislation unconstitutional on this ground, and it should not do so here.

Petitioners essentially argue that the application of any new or extended right under copyright to any then existing work can be deemed to promote progress only if it provides an incentive to create that specific work. That, of course, is a logical impossibility, and one by which the First Congress obviously did not feel bound. As the first Copyright Act

amply demonstrates, Congress can have a number of reasons, all consistent with the promotion of progress, for broadly extending the term of copyrights for both new and existing works. The Constitutional text does not restrict the purpose of copyright protection to providing "incentives," but speaks more broadly of promoting progress.

1. The CTEA Promotes Progress by Providing Authors the Continuing Benefit of Their Copyright Bargain

Changes in technology or other circumstances may alter some of society's fundamental assumptions regarding the value and commercial longevity of works of authorship. Because those assumptions necessarily underlie the constitutional bargain between authors and the public, Congress has reasonably concluded that authors will be better motivated to create works of authorship if they believe the copyright law will respond appropriately to those changes as they affect existing copyrights. Indeed, this was one of the primary goals of the CTEA.

Congress found that "[t]echnological developments clearly have extended the commercial life of copyrighted works." S. Rep. No. 104-315, at 12 (1996). Congress further found that "[s]ince 1976, the likelihood that a work will remain highly profitable beyond the current term of copyright protection has increased significantly as the rate of technological advancement in communications and electronic media has continued to accelerate. . . ." *Id.* In particular, Congress highlighted "the advent of digital media and the explosive growth of the National Information Infrastructure (NII) and the Global Information Infrastructure (GII)." *Id.*

2. Extending the Term of Subsisting Copyrights Will Enhance the Competitiveness of American Copyright Holders

Congress had additional, valid reasons to conclude that extending the term of existing copyrights would promote progress. In "1993, the European Union issued a directive requiring all members to adopt a copyright term of life of the author plus 70 years." S. Rep. No. 104-315, at 4 (1996). It also required all member states to apply the "rule of the shorter term," under which each member state is required to protect foreign works only for the shorter of the term of protection in the foreign country or the term of protection in the member country. *Id.* at 4. As a result, so long as the United States retained a life of the author plus 50 years copyright term, American works would be protected in Europe for a period twenty years shorter than the term of protection for European works. Of course, Americans then also would have received royalties in Europe for twenty fewer years than their European counterparts. *Id.* at 7. ("Failure on the part of the United States to provide equal protection for works in the United States will result in a loss for American creators and the economy of the benefits of 20 years of international copyright protection that they might otherwise have.") It also meant that American works at or near the end of their copyrights might be less likely than their European counterparts, with twenty additional years of protection, to be exploited in new media.

If the CTEA had extended the term of only new copyrights, then the benefits described above for holders of American copyrights would have been delayed for the better part of a century. By applying the CTEA to all works currently protected, those benefits accrued immediately. Over the past

several decades, Congress has endeavored to enhance the success and productivity of American creators of copyrighted intellectual property through adherence to the Berne Convention and other efforts to obtain strong intellectual property protection for American works of authorship throughout the world. It has apparently succeeded.

> America exports more copyrighted intellectual property than any country in the world. . . . In fact, intellectual property is our second largest export, with U.S. copyright industries accounting for roughly $40 billion in foreign sales in 1994. For nearly a decade, U.S. copyright industries have grown at twice the rate of the overall economy. And, according to 1993 estimates, copyright industries account for some 5.7 percent of the total gross domestic product. Furthermore, copyright industries are creating American jobs at twice the rate of other industries, with the number of U.S. workers employed by core copyright industries more than doubling between 1977 and 1993. Today, these core copyright industries contribute more to the economy and employ more workers than any single manufacturing sector, accounting for more than 5 percent of the total U.S. workforce.
>
> Largely, the stellar performance of U.S. copyright industries is the result of strong intellectual property protection.

S. Rep. No. 104-315, at 9-10 (emphasis added).

A recent study commissioned by the International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy: The 2002 Report* (2000), indicates an ever greater economic role of the copyright industries in the larger economy.

Thus, the CTEA's extension of the term of copyright for *all* works, including existing works, is a natural continuation of Congress' efforts to adapt United States copyright law as necessary to help ensure that an ever increasing number of Americans are actively and successfully involved in "the creative activity of authors and inventors," *Sony*, 464 U.S. at 429, 104 S. Ct. at 782.

3. The CTEA Further Promotes Progress by Harmonizing U.S. and International Copyright Law

Beginning with the 1976 amendments to the copyright law, which provided for protection for the life of the author plus 50 years, in line with then-current international standards, and continuing with the 1989 Berne implementation act, Congress has endeavored to harmonize U.S. copyright law with international copyright standards. The CTEA is an extension of those efforts, harmonizing U.S. copyright law with the emerging international standard to protect works for the life of the author plus 70 years.

Petitioners discount Congress' efforts to promote greater harmonization in two ways. First, they argue that promoting "harmonization" does not promote "Progress." Pet'r Br. at 22-23. As Congress concluded, however, "[u]niformity of copyright laws is enormously important to facilitate the free flow of copyrighted works between markets and to ensure

the greatest possible exploitation of the commercial value of these works in world markets. . . ." S. Rep. No. 104-315, at 8. Pursuing increased efficiency and trade through harmonization of laws affecting commerce is, of course, a common practice. By promoting growth in the industries that produce works of authorship, harmonization helps to "motivate the creative activity of authors and inventors," *Sony*, 464 U.S. at 429, 104 S. Ct. at 782. Thus, it "promotes the Progress of Science" in exactly the way contemplated in the Constitution.

Second, Petitioners argue that the CTEA does not really promote harmonization, because only a minority of countries have adopted the life plus 70 rule, and because other elements of the CTEA allegedly may make U.S. law less rather than more consistent with international copyright rules in some ways. Pet'r Br. at 44. Congress could reasonably conclude that the countries that have adopted the life plus 70 rule — those of the European Union — are more important trading partners than the countries that have not adopted that rule. Merely comparing the number of countries that have adopted the rule to the number of countries that have not gives very little useful information about the value of the rule to U.S. citizens. Furthermore, Congress believes that the life plus 70 rule will soon become the standard outside of Europe as well. S. Rep. No. 104-315, at 8 (quoting Statement of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services that "[I]t does appear that at some point in the future the standard will be life plus 70.")

4. The CTEA Promotes Progress by Encouraging the Preservation, Dissemination, and Exploitation of Valuable Older Works

Congress found that "the 20-year extension of copyright protection will . . . creat[e] incentives to preserve existing works." S. Rep. No. 104-315, at 13. The legislative history of the CTEA indicates that Congress was expressly concerned with "work contained in perishable media, such as records, film, audiotape, paper or canvas." *Id.* Congress found that copies of such works were at risk for "significant degradation of quality," a risk that could be alleviated by digital preservation of perishable media works, provided that someone was willing to pay the relatively high cost of transferring older works into a digital format. *Id.* Congress reasonably concluded that a longer copyright term would create an incentive to preserve older works by increasing the amount of time available to an investor to recover the investment and profit from the work. Such preservation of valuable older works plainly serves to promote progress, even though the works themselves were created long ago.

Petitioners admit that the CTEA may promote the preservation of works that continue to have commercial value, and their argument that it will discourage preservation by libraries or other organizations of a much larger number of works which are no longer generating royalties and for which the copyright owners can no longer be found is a *non sequitur*. Pet'r Br. at 45. That is essentially a legislative policy judgment.

Finally, extending the term of existing copyrights makes it easier for copyright holders, and other creators, to pursue opportunities to further develop, disseminate, and exploit

existing works. Many of these opportunities require large investments to realize. For example, to develop a novel or a popular character into a motion picture, create related interactive games and Internet sites, or create merchandising opportunities may require up-front expenditures of tens or even hundreds of millions of dollars. Because of the size of the required investment, film-makers and others who work with copyrighted material, if basing a motion picture or other major work on a pre-existing work of authorship, may prefer to license exclusive rights to a protected work than to use a public domain work. The reason is that using a protected work reduces the risk that another film maker would dilute interest in the motion picture by creating a similar motion picture. In this way, too, extending the term of existing copyrights promotes progress by "motivat[ing] the creative activity of authors and inventors," *Sony*, 464 U.S. at 429, and thus is a constitutional exercise of legislative power.

C. There Is No Applicable "Congruence and Proportionality" Test

Petitioners propose that this Court remand the case for a determination whether the government can prove that CTEA's extensions of copyright terms are "'congruent and proportional' to proper Copyright Clause ends." Pet'r Br. at 31. There is no sound basis for their suggestion. Subjecting Congress' policy decisions to such scrutiny (1) has no support in the Constitution or the cases decided thereunder; (2) is unworkable because it offers this Court no justiciable standards, and (3) would burden, rather than promote, progress. *Cf. Sony*, 464 U.S. at 431 (finding that Congress "has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by . . . new technology [that affects copyrighted works].")

1. The Court's Fourteenth Amendment Cases Do Not Support Applying a "Congruence and Proportionality" Standard to Extensions of Existing Copyright Terms

Petitioners cite *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) for the proposition "that 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end' for legislation passed pursuant to § 5 of the 14th Amendment." Pet'r Br. at 31. They then suggest that the "the same structure can guide the Court in enforcing the limits of the Copyright Clause," and ask the Court to remand the case for an evaluation of the CTEA under this test. Pet'r Br. at 31-32.

In applying the "congruence and proportionality" standard of review to Congress' exercise of authority under Section 5 of the Fourteenth Amendment, however, the Court has noted that Congress' authority under Section 5 is "remedial," not "plenary." *City of Boerne*, 521 U.S. at 519-29. Unlike Congress' power under the Fourteenth Amendment, Congress' power under the Copyright Clause, like its power under the Commerce Clause and other Article I powers, is "plenary," not merely "remedial." Congress has the ultimate and sole authority to legislate regarding copyrights. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964); *see also* 17 U.S.C. § 301. Although the Constitution requires that grants of copyright be for "limited Times," it does not require that such grants be for the shortest time necessary to achieve certain goals. Applying a "congruence and proportionality" test for any enactments

under the Copyright Clause or any other Article I power would unconstitutionally usurp Congress's plenary authority to implement the Copyright Clause.

2. No Judicially Manageable Standards Exist to Guide a Congruence and Proportionality Test of Copyright Extensions

Unlike the Fourteenth Amendment context, applying a "congruence and proportionality" test here would enmesh the Court in policy judgments about the appropriate length of copyright term extensions that are uniquely the province of Congress to resolve. Petitioners themselves concede that this Court has no judicially manageable basis for resolving such questions. "Whether 50 years is enough, or 70 years too much, is not a judgment meet for this Court." Pet'r Br. at 14.

3. The Uncertain Application of a Congruence and Proportionality Test Would Retard Rather Than Promote Progress

A congruence and proportionality test would undermine the fundamental purpose for which the Constitution granted Congress authority to establish copyright protection. The judicial scrutiny that petitioners would require of each alteration of existing copyright protection would generate substantial uncertainty in the marketplace for works of authorship. As a result, such extensions will be less effective in motivating additional creative activity, thus undermining the public's ability to benefit from the bargain contemplated in the Copyright Clause.

Any time Congress attempted to extend the term of copyright, the market would likely perceive substantial uncertainty regarding whether works affected by the extension are protected until the extension is blessed by this Court. This Court has recognized the importance of "enhancing predictability and certainty of copyright ownership" when it rejected a proposed interpretation of "work for hire" in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749-50 (1989):

> Finally, petitioners' construction of the work for hire provisions would impede Congress' paramount goal in revising the 1976 Act of enhancing predictability and certainty of copyright ownership. In a 'copyright marketplace,' the parties negotiate with an expectation that one of them will own the copyright in the completed work. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.

III. The Decision Below Correctly Held That The CTEA Does Not Violate The First Amendment

The narrow holding below is no blanket repudiation of First Amendment principles in the field of copyright. Petitioners' suggested intermediate First Amendment scrutiny would add nothing to the analysis Petitioners already ask this Court to undertake in their challenge to Congressional power under the Copyright Clause.

A. The Copyright Act Is Not in Tension with the First Amendment

Petitioners assert a facial challenge to the CTEA under the Free Speech and Free Press Clauses of First Amendment. Pet'r Br. at 7-8. When evaluating such an attack on an act of Congress, this Court must "proceed with caution and restraint," upholding the enactment unless it is "not readily subject to a narrowing construction . . . *and* its deterrent effect on legitimate expression is both real and substantial." *Erznoznik v. City of Jacksonville, Fla.*, 422 U.S. 205, 216 (1975) (voiding local ordinance concerning depictions of nudity on drive-in movie screens) (emphasis added).

Here, neither condition is satisfied. The CTEA is by definition subject to two significant, speech-protective narrowing constructions generally applicable to the Copyright Act, the fair use doctrine (§ 107) and the idea/expression distinction (§ 102(b)). In addition, the CTEA poses no real or substantial threat of abridging legitimate speech rights because it merely extends the term of authors' existing protections, which themselves raise no Constitutional concerns.

1. The CTEA Poses No Cognizable Threat to Legitimate Speech Interests

The extension of a work's copyright term does not raise First Amendment concerns. If the work has been made available to the public by the author, the public right to engage with it in the marketplace of ideas is not abridged. The First Amendment does not guarantee that every citizen, or even every library, will be able to afford every work

See, e.g., Hearst Corp. v. Stark, 639 F. Supp. 970, 975-976 (N.D. Cal. 1986).[18]

The Court below properly held, without dissent, that the Petitioners "lack any cognizable First Amendment right to exploit the copyrighted works of others." 239 F.3d at 376. In so holding the Court did not declare the Copyright Act beyond the scope of First Amendment review, but merely repeated the well-settled rule that the Act itself, through the idea/expression dichotomy in § 102(b) and the fair use doctrine in § 107, already embodies "adequate protection to free expression." *Id.* (quoting *United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989)). A*ccord Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1984) (rejecting First Amendment defense "in view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use").

In refusing to recognize a free-standing First Amendment defense to copyright infringement, this Court in *Harper & Row* simply applied the analogous reasoning of its libel decision earlier the same year in *Calder v. Jones*, 465 U.S. 783 (1984). Writing for a unanimous Court, (now Chief)

18. In analogous cases, this Court has held that the purely economic consequences which legislation may have on speech do not raise First Amendment concerns. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 476 (1997) (doubts concerning legislative policy judgments do not justify reliance on the First Amendment as a basis for reviewing economic regulations); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (First Amendment inquiry is not concerned with economic impact, only with the effect on freedom of expression).

Justice Rehnquist held in *Calder* that where the substantive law governing potentially speech-restrictive litigation itself embodies First Amendment protections, the Court need not conduct any First Amendment analysis of the jurisdictional statute on which the action was premised.

As with the libel law in *Calder*, and as recognized in *Harper & Row*, here the substantive law of copyright provides adequate protection for First Amendment interests, by precluding protection for ideas and permitting fair use of protected expression. Because these narrowing constructions are built into the Copyright Act itself, at sections 102(b) and 107, they preserve First Amendment interests during the entire duration of every copyright, rendering the term of protection irrelevant to those concerns.

2. Petitioners' Proposed First Amendment Analysis of the CTEA Would Be Redundant

Once the Court determines that Congress permissibly enacted a life-plus-70 term pursuant to the Copyright Clause, then it necessarily determines that any speech "restriction" imposed by the CTEA (1) serves an important governmental interest, *i.e.*, promoting progress, and (2) is necessary to that end. Accordingly, the level of free speech scrutiny proposed by Petitioners is, in application, no higher than the necessary and proper review to which all acts of Congress are subject.

3. The CTEA Is Not Overly Broad

If the CTEA extends copyright terms for many works as to which no incentive purpose will be served, as Petitioners assert, it is not distinguishable in this respect from any other U.S. copyright statute ever written, including the Act of 1790. That Act, and every successor thereto, protected all original writings in particular categories, *e.g.*, "maps," without in any way suggesting that the validity of a given copyright could depend on the incentives that motivated a particular mapmaker. With this argument, Petitioners are in fact urging this court to adopt a "least speech-restrictive means" standard which they themselves recognize to be improper, Pet'r Br. at 45, and in the process they unjustly fault Congress for rightly declining to engage in Constitutionally dubious work-by-work discrimination.

CONCLUSION

As demonstrated above, Petitioners' facial challenge to the constitutionality of the CTEA is without sound basis. Accordingly, *Amicus* AIPLA respectfully urges this Court to reject Petitioners' challenge and affirm the decision of the Court of Appeals.

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